Supreme Court, U.S.
FILED

951520 MAR 20 1996

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No. _____

In The

Supreme Court of the United States

October Term, 1995

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a district court hold a state prison official in civil contempt for issuing a notice informing inmates that in thirty days sexually explicit publications would be prohibited in Arizona's prisons, when: (a) the allegedly contemptuous prohibition was withdrawn two days before it became effective, one week before the contempt hearing even started, and three months before the district court issued its finding of contempt, (b) when no publications were withheld because of the notice, and (c) when this Court's decisions make clear that civil contempt is to be used solely for remedial or coercive purposes and do not recognize the doctrine of anticipatory repudiation in the law of contempt?

PARTIES TO THE PROCEEDING BELOW

Petitioners are the State of Arizona, Terry L. Stewart, the current Director of the Arizona Department of Corrections, and Samuel A. Lewis, who held the position of Director during the proceedings below.

The Respondents were Arizona inmates who brought a civil rights action challenging mail regulations at the Arizona prisons in 1973. They include Evan Arthur Hook, John Purdy, Muriel R. Thigpen, Gregory A. Cottrell, Donald Adsitt, Jr., Murry Mathews, Christopher Keohane, Michael A. Troutman, Daniel Gutierrez, James Lee Hess, Bennie Lee West, Charles Bucher, Melvin Munroe Littrell, and Clifton Blockinger. This contempt proceeding was brought on behalf of current inmate beneficiaries of a Consent Decree entered in 1973.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals opinion is not reported. Appendix ("App.") A. The judgment of the United States District Court for the District of Arizona is also not reported. App. B.

STATEMENT OF JURISDICTION

On October 19, 1995, the court of appeals entered the judgment from which review is sought. App. A. On January 30, 1996, the court denied rehearing. App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF THE CASE

In 1973, the Arizona Department of Corrections ("ADOC") entered into a Consent Decree with several inmates who had filed suit claiming that ADOC's mail policies were unconstitutional. (App. C.) The Consent Decree created new mail regulations for ADOC, and provided in pertinent part:

> *Publications* Residents may receive books, newspapers and periodicals etc., if mailed directly by the publisher or book retailer. Individual issues of publications will be excluded if they contain instructions on the manufacturing of homemade weapons, bombs, explosives, escape material, brewing of alcoholic beverages, or if they otherwise contain material which constitutes a direct and immediate threat to the security, safety or order of the institution, or if they contain any material which is deemed obscene under applicable constitutional standards. Prompt written notice will be given a resident if any publications are excluded for the above reasons. Upon request, the resident will be given an opportunity to discuss the reasons for the exclusion with the Deputy Superintendent for Programs, whose decision shall be final.

(*Id.* at 35-36.)

On January 31, 1994, ADOC's Director, Samuel A. Lewis, issued a notice addressed to all inmates stating that "[e]ffective February 27, 1994, all magazines that are devoted to sexual themes . . . are not authorized in the Arizona Prison System." (Plaintiffs' Exhibit 16, Defendants' Exhibit 1; See App. B at 10-11.) This notice was to be "posted in inmate access areas for 30 days prior to the above referenced effective date." (*Id.* at 11.) Director Lewis testified that the ban was desired because sexually explicit magazines create a hostile and dangerous environment for female prison staff. (Testimony of Director Lewis, March 8, 1994 Hearing, C.D. 337 "TR" at 67; *see also* App. B at 12.)

On February 17, 1994, the inmates' court-appointed counsel informed ADOC's counsel that, in their opinion, the proposed prohibition violated the 1973 Consent Decree. (Testimony of John Frank, TR at 107; *see also* App. B at 12.) On February 23, 1994, the inmates' counsel wrote to ADOC's counsel, stating that "by Friday February 25 you will either give us your view as to why this is not a contempt or present for immediate consideration a reasonable proposal for modification of the order." (Plaintiffs' Exhibit 17; *see also* App. B at 13.) On February 24, 1994, ADOC's attorney informed the inmates' counsel that Director Lewis would not withdraw his proposed order. (Joint Prehearing Statement, C.D. 329 at 7; *see also* App. B at 13.)

On February 25, 1994, the inmates' counsel filed a petition in the district court seeking both civil and criminal contempt sanctions against Director Lewis personally for his alleged violation of the 1973 Consent Decree. (C.D. 313, 314.) However, on that same day at approximately

1:00 p.m., Director Lewis decided at a meeting with officials of the Arizona Governor's Office that, although he did not feel it was required, he would rescind the January 31 notice and seek to implement the policy through a motion to modify the Consent Decree. (Testimony of Director Lewis, TR at 72; *see also* App. B at 13.) At approximately 2:00 p.m. the same day, the inmates' counsel informed ADOC's attorney that a hearing on the civil and criminal contempt sanctions would be held that afternoon at 3:00 p.m. (Joint Prehearing Statement, C.D. 329 at 7; *see also* App. B at 13.) Either during that conversation, or shortly thereafter, ADOC's attorney informed the inmates' counsel that Director Lewis had decided to withdraw the January 31 directive. (Joint Prehearing Statement, C.D. 329 at 8; *see also* App. B at 14.) Later, at the hearing, ADOC's attorney affirmed in open court that Director Lewis had withdrawn the January 31 directive. (Joint Prehearing Statement, C.D. 329 at 9; *see also* App. B at 14.)

While the hearing was underway in the district court, between 3:00 and 3:30 p.m., Director Lewis issued a memorandum to all prison wardens rescinding the January 31 notice and directed his staff to inform each warden verbally that the inmates should be informed that the notice was withdrawn.[1] (Defendants' Exhibit 2; Testimony of Director Lewis, TR at 73; *see also* App. B at 14-15.)

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[1] The rescission order was directed to the wardens, not the inmates, because only the wardens had the authority to advise the mail rooms not to halt receipt of sexually explicit magazines.

Thus, the January 31 notice was rescinded before the proposed order took effect. No inmate was denied delivery of a single publication because of the January 31, 1994 notice. (Testimony of Director Lewis, TR at 68; *see also* App. B at 15.)

Despite the Director's retraction of the January 31 notice, the district court ordered a hearing on the request for civil contempt, which was held on March 8, 1994. (C.D. 330, 337.) On June 8, 1994, over three months after the Director rescinded the January 31 notice, the district court issued its order finding that "Director Lewis was in civil contempt when he issued his January 31, 1994 order." (C.D. 354, App. B at 22.) As a sanction, the court awarded the inmates' counsel their attorneys' fees for time spent pursuing the contempt action. (*Id.*) The court issued the contempt sanction against Director Lewis personally, stating that the sanctions "are not to be borne by the taxpayers of the state in any way." (App. B at 24.)

In a two sentence memorandum decision,[2] the court of appeals reversed the personal nature of the sanction

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[2] The memorandum decision addressed the consolidated appeals from both the finding of contempt and the later order setting the amount of attorneys' fees. Petitioners do not seek review of the court of appeal's affirmance of the district court's August 4, 1994 Order, in which the district court set the amount of the attorneys' fees sanction and ruled on various other matters. Consequently, the lengthy August 4, 1994 Order is not set forth in the Appendix. However, a copy of this Order has been sent to the Clerk of this Court to expedite any necessary review of the August 4, 1994 Order.

against Director Lewis, but affirmed the contempt finding, declaring without explanation that the district court had not abused its discretion. (App. A.)

REASONS TO GRANT THE PETITION

I. THE LOWER COURTS' CIVIL CONTEMPT RULINGS CONFLICT WITH THIS COURT'S PRECEDENT REQUIRING THAT CIVIL CONTEMPT BE COERCIVE OR REMEDIAL.

Unquestionably, federal courts have the inherent power to enforce compliance with their lawful orders through civil contempt. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). However, while " 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited.' " *Spallone v. United States*, 493 U.S. 265, 276 (1990) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)). "[T]he contempt power also uniquely is 'liable to abuse.' " *International Union, United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2559 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) and *Ex parte Terry*, 128 U.S. 289, 313 (1888)). The judiciary must, therefore, be ever vigilant to protect against the arbitrary exercise of the awesome power of contempt. *See International Longshoremen's Assn., Local 1291 v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76 (1967) ("The judicial contempt power is a potent weapon," and when used improperly, "it can be a deadly one.").

This Court has created a simple test for deciding if a civil or criminal contempt has occurred in a particular circumstance: "what does the court primarily seek to

accomplish by imposing sentence?" *Shillitani*, 384 U.S. at 370. "If [relief] is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if [relief] is for criminal contempt the sentence is punitive, to vindicate the authority of the court." *Id.* (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Thus, civil contempt proceedings are employed either to " 'coerce the defendant into compliance with the court's order, [or] to compensate the complainant for losses sustained.' " *Local 28 of Sheet Metal Workers' International Assn. v. E.E.O.C.*, 478 U.S. 421, 443 (1986) (quoting *United States v. Mine Workers*, 330 U.S. 258, 303-04 (1947)).

In *Gompers*, this Court gave as an example the situation where a party to a divorce proceeding refuses to pay court-ordered alimony, or to surrender property ordered to be turned over to another. In those circumstances, the contumacious party could be punished in civil contempt until the party complied with the order. 221 U.S. at 442. In such cases, the punishment "is not to vindicate the authority of the law, but is remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant." *Id.*

Applying this Court's test to the circumstances presented here, the conclusion is inescapable that the district court did not act within its authority when it held Director Lewis in civil contempt because the order contemplated in the allegedly contemptuous January 31 notice never went into effect. Any threat of non-compliance that existed when Director Lewis issued the January 31 notice, which announced that in thirty days sexually explicit materials would be prohibited in Arizona's prisons, vanished when Director Lewis withdrew the proposed

prohibition. No inmate lost a single publication because of the Director's actions.

No remedial or coercive purpose could be served when the district court held its hearing a week after the January 31 notice was withdrawn, and certainly three months later when the district court entered its order finding Director Lewis in civil contempt. There was nothing to remedy, and no threat remaining that required coercion.

Thus, either the district court found civil contempt in disregard of this Court's decisions reserving such a finding to situations requiring remediation or coercion, or the district court actually rendered its contempt finding to vindicate its authority, in which case it constitutes an improper criminal finding without the benefit of the necessary criminal protections, such as proof beyond a reasonable doubt. *See Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 632 (1988). In either case, the district court and the court of appeals ignored this Court's well established case law. This Court should grant certiorari to correct the misapplication of its precedent.

II. THE LOWER COURTS' DECISIONS INTRODUCE FOR THE FIRST TIME THE CONCEPT OF ANTICIPATORY REPUDIATION INTO THE LAW OF CONTEMPT.

The district court's decision also deserves this Court's attention because it raises a substantial issue of national importance that has not been decided by this Court, or by apparently any other court. Assuming the district court's decision can truly be characterized as civil

contempt, for the first time in reported federal jurisprudence, the lower courts have introduced the concept of "anticipatory repudiation" into the law of contempt. Neither this Court, nor any other federal court, has ever held a state official in contempt of court for issuing a proposed directive that never became effective. Good reason exists for this dearth of authority; absent an actual violation of a court order, there can be no contempt.

To borrow from this Court's example in *Gompers*, a person can say that he will not pay his alimony, or threaten not to turn over property to another. If, however, on the day compliance is due, the person nevertheless complies with the applicable court order, civil contempt has not occurred. A court cannot hold the party in contempt for merely stating his intent to violate the court's order at a future time.

To hold otherwise, as the lower courts have done here, takes the law of contempt onto a slippery slope subject only to the arbitrary whim of a particular district court judge. All parties that become bound to a court's order need to be able to understand clearly and in advance the methods by which compliance with the court order will be enforced. Most importantly, parties are entitled to know the means by which contempt can be avoided. Under the current law of civil contempt, compliance is the key to freedom from sanction, and the contemnor himself holds the key "in his own pocket." *Gompers*, 221 U.S. at 442. If this Court allows the lower courts' decisions to stand, compliance itself is no longer a guarantee of freedom, because even months after compliance has occurred, a finding of civil contempt could still be entered.

This result is especially detrimental in this case, where the finding of contempt was entered against an official charged with running a state prison. This Court has acknowledged the greater expertise of prison officials concerning issues of penal management, and has specifically directed that courts should defer to prison administrators in resolving the day-to-day problems in managing a prison. *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989). Judicial deference to the judgment of prison administrators stems not only from the judiciary's limited competence in penal management, but also from the doctrine of separation of powers. As this Court stated in *Turner v. Safley*, 482 U.S. 78, 84-85 (1987):

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

See also Bell v. Wolfish, 441 U.S. 520, 548 (1979) (same); *Missouri v. Jenkins*, 115 S. Ct. 2038, 2054 (1995) (state institutions should be run by state and local authorities).

Here, Director Lewis issued his January 31 notice setting forth a future prohibition on sexually explicit magazines in conformance with the express terms of the 1973 Consent Decree, which specifically gave ADOC the ability to restrict publications that were found to be a threat to the orderly administration of the prison. Then, after being told that a dispute existed concerning the

notice, and before the proposed order took effect, Director Lewis withdrew it. Director Lewis should be able to rely on this Court's controlling authority on contempt law, which states that his withdrawal of the offending proposal nullifies any question of his compliance with the Consent Decree.

Nevertheless, the district court disregarded this authority, carried forward with the contempt hearing, and three months after Director Lewis withdrew the notice, entered a finding of civil contempt. This result, which allows a federal court to issue contempt sanctions against a state prison official not for what was done, but for what was contemplated and withdrawn, makes impossible the already difficult task of prison management.

Neither the inmates nor the lower courts have been able to cite to any case from this Court, or any federal court, recognizing "attempted contempt" or "anticipatory repudiation" in the law of contempt. This Court should stand firm against the lower courts' attempt to so broaden the law of contempt by granting certiorari and reversing the misapplication of contempt law in this case.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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March 19, 1996